

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 8, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal Nos. 2016AP1190-CR  
2016AP1191-CR**

**Cir. Ct. Nos. 2015CF486  
2015CF487**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES M. POPE,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments of the circuit court for Dane County:  
WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. James M. Pope appeals judgments of conviction entered upon his guilty pleas to one count of burglary, two counts of battery to law enforcement officers, and one misdemeanor count of intimidating a victim. Pope

argues that the circuit court erroneously exercised its discretion in denying his request for new counsel made during his sentencing hearing.<sup>1</sup> We reject Pope's claim and affirm.

## BACKGROUND

¶2 Across two circuit court cases, Pope was charged with seven counts, all as a repeater. The State Public Defender's Office appointed Attorney Christopher Duren to represent Pope. Appointed counsel's brother, Attorney Blake Duren, represented Pope in court for the waiver of Pope's preliminary hearing.

¶3 Blake Duren also represented Pope at his plea hearing. At the start of the plea hearing, the circuit court stated its understanding that Pope was having second thoughts about entering into the plea agreement. Blake Duren confirmed that Pope was having reservations. The circuit court advised Pope that it would not accept a plea agreement after that day and permitted Pope several hours to discuss the matter with counsel. Back on the record, Blake Duren informed the court that he and Pope had discussed how to proceed, and that Pope wanted to accept the plea agreement "as offered." The court confirmed Pope's desire to enter into the plea agreement, and conducted a plea colloquy to ascertain that Pope's pleas were knowing, intelligent, and voluntary. Pope pled guilty to the four above-referenced charges without the repeater enhancers; the enhancers were dismissed and all remaining counts were dismissed and read in. The court ordered

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<sup>1</sup> Pursuant to this court's jurisdictional order of August 12, 2016, the issue on appeal is "limited in scope to ... whether the circuit court erroneously exercised its discretion when it denied Pope's request for new counsel made at sentencing."

the preparation of a presentence investigation report (PSI) and adjourned the matter for sentencing.

¶4 At sentencing, Pope again appeared with Blake Duren. The parties commented on the PSI and made their respective arguments and recommendations. When it was time for Pope to make his allocution, he told the circuit court that he wanted his trial counsel to withdraw and that he had filed a motion to that effect. Observing that Pope's motion was not in the file, the court asked him if he had a copy, to which Pope answered "No."<sup>2</sup> The circuit court asked Pope why he wanted trial counsel to withdraw and Pope said his counsel was ineffective. On further inquiry, Pope explained he wanted to have a trial on the burglary charge because he did not commit that crime and did not look like the perpetrator in the surveillance video. When the circuit court asked why he pled guilty, Pope stated his trial counsel pressured him into pleading because counsel thought a jury would find Pope guilty. The circuit court asked Pope why he had not mentioned this pressure at the plea hearing, and Pope responded in a circular fashion by saying his plea was "forced." The court then asked him, "Why didn't you tell me that?" Pope's answer was nonresponsive.

¶5 Pope also told the circuit court that he had asked his trial counsel to withdraw months ago. Blake Duren told the court that he would have moved to withdraw had Pope asked him to do so. Pope stated that he had asked Blake's brother, Christopher Duren, to withdraw. Blake Duren told the court that he had done "quite a bit of work" on this case and believed he had well represented Pope,

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<sup>2</sup> Pope's pro se motion seeking new counsel was dated October 7, 2015, and is shown as being filed October 12, 2015. The sentencing hearing occurred on October 9, 2015.

but suggested that the court should allow him to withdraw if that was Pope's wish. The prosecutor argued that there was no basis for allowing trial counsel to withdraw.

¶6 The circuit court denied Pope's request for a new attorney:

Right now here's what I'm up against. I've got a guy that once told me with a straight face, after I directly asked the defendant a series of questions, important questions, whether or not – whether or not he knew the rights he was giving up, trial rights given up, if I could rely upon the facts in the Criminal Complaint to support the plea, all of those things, and I relied upon his representations to me, and I had no reason to believe that the defendant was lying to me at that time. Now he's saying that he must have had his fingers crossed back when that was happening. Well, right now we're halfway through sentencing. This is the defendant's ability to speak at the time of sentencing, and he wishes to go back and redo it. Well, we're not at that point right now. You'll certainly have a right to file post-conviction motions, but you know, it's not just you that this proceeding is about here today. I've got a number of people. I've got victim-impact statements that have been written. I've got people who have been victimized by you that have a right under Chapter 950 of the Wisconsin Statutes to have this case conducted and concluded and to put it behind them.

The court proceeded to sentencing. On appeal, Pope challenges the circuit court's decision denying his request for new counsel.

## DISCUSSION

¶7 The decision whether to grant a defendant's request for new counsel is a discretionary matter for the circuit court. *State v. Darby*, 2009 WI App 50, ¶28, 317 Wis. 2d 478, 766 N.W.2d 770. “We uphold a discretionary decision if the circuit court logically interpreted the facts, applied the proper legal standard to the relevant facts, and used a rational process to reach a reasonable conclusion.”

*Id.*

¶8 In determining whether the circuit court properly denied a defendant's request for new counsel, we consider:

(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

*State v. Lomax*, 146 Wis. 2d 356, 359-60, 432 N.W.2d 89 (1988).

¶9 Pope first challenges the adequacy of the circuit court's inquiry. When a defendant requests new counsel, the circuit court should conduct an inquiry to determine the basis for the request. *See State v. McDowell*, 2004 WI 70, ¶¶66, 71, 272 Wis. 2d 488, 681 N.W.2d 500; *State v. Kazee*, 146 Wis. 2d 366, 371-72, 432 N.W.2d 93 (1988). The circuit court's inquiry is not required to "satisfy a particular formula." *Kazee*, 146 Wis. 2d at 372. Once "the reasons for the defendant's request are made known, or are apparent, the court may exercise its discretion without further inquiry." *Id.* *See also Lomax*, 146 Wis. 2d at 362 (upon a defendant's request for new counsel, a meaningful inquiry "may not take more than minutes.").

¶10 We conclude that the circuit court's inquiry was adequate to inform the court of the basis for Pope's request and the nature of his complaints, and to permit an informed exercise of discretion concerning the substitution of counsel. The circuit court stopped the proceeding and, in a discussion spanning eight transcript pages, directly asked Pope about his specific concerns and sought input from trial counsel and the prosecutor. The circuit court elicited sufficient information to properly exercise its discretion.

¶11 Pope contends that the circuit court’s inquiry was inadequate because the court did not consider that a defendant can more easily withdraw a plea before sentencing than after sentencing, and that its failure to do so “eviscerated all substantive, procedural and evidentiary benefits that Pope may have enjoyed pertaining to pre-sentencing plea withdrawal.” Pope offers no authority for the proposition that, in conducting an inquiry into a defendant’s reasons for wanting new counsel, the circuit court must consider the applicable plea withdrawal standard. Indeed, we fail to see how the applicable plea withdrawal standard is relevant to whether the court sufficiently determined the basis for Pope’s complaints about trial counsel. Pope could have filed a postconviction motion challenging the denial of his request for substitute counsel, or requesting plea withdrawal under either the “fair and just reason” or the “manifest injustice” standard.<sup>3</sup> He did not. The issue on appeal is the propriety of the court’s decision denying Pope’s late request for new counsel. We reject what amounts to an attempt to piggyback onto this issue an unpreserved plea withdrawal claim.

¶12 Next, asserting he “theoretically had the right to represent himself,” Pope suggests that the circuit court’s inquiry was insufficient because it “failed to examine whether Pope wished to exercise his right to proceed pro se as opposed to being forced to proceed to sentencing with trial counsel.” We disagree. A circuit court “has no duty to advise a defendant of the right to self-representation prior to an invocation of that right by a clear and unequivocal declaration.” *Darby*, 317

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<sup>3</sup> Postconviction, Pope could have asserted that due to the timing of the circuit court’s denial of his request for new counsel, a plea withdrawal request should be reviewed under the “fair and just reason” standard.

Wis. 2d 478, ¶24. “[A] defendant’s expressions of dissatisfaction with his or her current attorney or a request for another attorney do not constitute a clear and unequivocal declaration that the defendant wants to proceed pro se.” *Id.*, ¶26. Here, Pope never suggested that he wanted to proceed pro se, and the court “had no obligation to advise him of this right.” *Id.*, ¶24.

¶13 Having concluded that the circuit court’s inquiry was adequate, we turn to its exercise of discretion in light of the two remaining *Lomax* factors. With regard to timeliness, eleventh hour requests for new counsel are generally disfavored. *See Lomax*, 146 Wis. 2d at 361-62. However, a late request may be deemed timely if the conflict between the defendant and counsel arose shortly before the defendant asked for a new attorney. *See id.* at 362.

¶14 We conclude that the timing of Pope’s request supports the circuit court’s exercise of discretion. By Pope’s own account, he had asked Christopher Duren to withdraw “some months before.” As such, Pope’s complaints did not arise shortly before his last-minute request. Pope could have but did not raise his alleged concerns earlier, for example, at the plea hearing, which occurred more than six weeks before sentencing. Instead, Pope assured the plea-taking court that he understood what was going on and that he had no “questions whatsoever.” Further, Pope did not make his request at the start of sentencing, but waited until allocution.

¶15 To the extent Pope suggests that a portion of the untimeliness is attributable to Christopher Duren, we observe that Blake Duren represented Pope at the plea and sentencing hearings. Pope did not ask Blake Duren to withdraw. Though given the opportunity, Pope never explained why he did not ask Blake Duren to withdraw prior to sentencing.

¶16 Pope points to several facts which, he asserts, weigh in his favor on the timeliness prong, namely, the relative youth of the case and that he was still on his first SPD-appointed attorney. Acknowledging that his request for new counsel would necessarily cause an adjournment, Pope further suggests that because his request came at sentencing rather than before a trial, the interests of the circuit court, parties, and victims were of reduced significance.

¶17 Nothing in Pope’s argument persuades us that the circuit court erroneously exercised its discretion. The court considered relevant factors and reached a reasonable decision. Pope has not cited any authority for the proposition that the timeliness of a request for new counsel varies depending on whether it occurred before trial or before or during sentencing.

¶18 Turning to the third and final factor, “the defendant must show good cause for substitution of appointed counsel, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which could lead to an unjust verdict.” *Darby*, 317 Wis.2d 478, ¶29. “The ability-to-communicate assessment is left to the reasoned discretion of the [circuit] court.” *State v. Jones*, 2007 WI App 248, ¶13, 306 Wis. 2d 340, 742 N.W.2d 341.

¶19 Pope argues that once he alleged trial counsel’s ineffectiveness, “a legal conflict materialized which impeded communication between counsel and client, and which prevented Pope’s interests from being advanced.” We are not persuaded. Pope made this allegation after trial counsel completed his sentencing argument, when all that was left to do was the filing of a notice of intent to pursue postconviction relief requesting the appointment of new counsel. Pope has not alleged any facts suggesting that his in-court assertion of trial counsel’s

ineffectiveness, made just before the circuit court imposed sentence, prevented counsel from communicating with Pope or advancing his interests.

¶20 In sum, we conclude that the circuit court properly exercised its discretion in denying Pope’s request for new counsel. The circuit court noted that they were “halfway through sentencing,” that Pope’s victims had submitted victim-impact statements, that the purpose of the sentencing hearing was not to “redo” Pope’s guilty pleas, and that Pope could file postconviction motions. These are proper considerations which support the circuit court’s rational decision.

*By the Court.*—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).

